

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

KING BLOSSOM NATURAL, LLC., a
Washington limited liability
company, d/b/a KING BLOSSOM
CA,

Plaintiff,

v.

WAUSAU BUSINESS INSURANCE
COMPANY, a foreign
corporation; HARTFORD STEAM
BOILER INSPECTION & INSURANCE
COMPANY, a foreign
corporation,

Defendants.

NO. CV-05-133-EFS

**ORDER DENYING PLAINTIFF'S
MOTION TO REMAND**

BEFORE THE COURT for hearing without oral argument is Plaintiff King Blossom Natural, LLC's Motion to Remand, (Ct. Rec. 8). The Court has reviewed the motion, briefs, and record and now enters this Order **denying** Plaintiff's motion.

I. BACKGROUND

On April 5, 2005, Plaintiff filed suit against Defendants Wausau Business Insurance Company ("Wausau") and Hartford Steam Boiler Inspection & Insurance Company ("Hartford") in Okanogan County Superior Court, (Ct. Rec. 1 at 7). On April 5, 2005, the Insurance

1 Commissioner of the State of Washington ("Insurance Commissioner")
2 accepted service on behalf of Hartford and Wausau in the
3 aforementioned Okanogan County suit, (Ct. Rec. 1 at 16; Ct. Rec. 18 at
4 5), as authorized by Revised Code of Washington ("RCW") § 48.05.200.
5 Mr. Russell Yates, a Colorado State attorney, signed an Acceptance of
6 Service on April 19, 2005, on behalf of Wausau, (Ct. Rec. 15 at 3),
7 after it was forwarded to him by the Insurance Commissioner.

8 On May 2, 2005, Hartford filed a notice of removal of Plaintiff's
9 case to the Eastern District of Washington, (Ct. Rec. 1) which did not
10 contain an explicit joinder by Wausau. However, on May 6, 2005,
11 Wausau filed a Demand for Jury, (Ct. Rec. 5). Additionally, on May 9,
12 2005, Wausau filed an answer to Plaintiff's complaint with this Court,
13 (Ct. Rec. 7). In its answer, Wausau "admits that venue and
14 jurisdiction is proper in the United States District Court for the
15 Eastern District of Washington. . . ." *Id.* at 3. Thereafter,
16 Plaintiff filed its Motion to Remand this matter to Okanogan County
17 Superior Court, (Ct. Rec. 8).

18 II. Discussion

19 "The burden of establishing federal jurisdiction is on the party
20 seeking removal and the removal is strictly construed against removal
21 jurisdiction." *Prize Frize, Inc. v. Matrix (U.S.) Inc.*, 167 F.3d 1261,
22 1265 (9th Cir. 1999). A defendant may remove a civil case to federal
23 court if it is clear from the plaintiff's complaint there is either a
24 "federal question" or diversity jurisdiction. 28 U.S.C. § 1441(a) &
25 (b). However, even if the case is removable by these standards, all
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1 removals must comply with procedural requirements created by Congress.

2 First, the

3 defendant or defendants desiring to remove any civil action
4 or criminal prosecution from a State court shall file in the
5 district court of the United States for the district and
division within which such action is pending a notice of
removal

6 18 U.S.C. § 1446(a). In cases involving multiple defendants,

7 "[s]ection 1446 requires all proper defendants to join or consent to

8 the removal notice." *Prize Frize, Inc.*, 167 F.3d at 1266. Second, the

9 notice of removal must be "filed within thirty days after receipt by

10 the defendant, through service or otherwise, of a copy of the initial

11 pleading setting forth the claim for relief upon which such action or

12 proceeding is based" 28 U.S.C. § 1446(b).

13 Thus, in determining whether Plaintiff's Motion to Remand should

14 be granted, the Court must determine whether Hartford's attempt to

15 remove this case to federal court complied with the procedural

16 requirements of 28 U.S.C. § 1446. In doing so, the Court must

17 consider whether Defendants unanimously gave notice of removal or

18 effectively consented thereto. If adequate notice or consent to

19 removal was given, the Court must then determine whether the notice

20 and/or consent were timely made.

21 **A. Notice of Removal and Consent**

22 As stated above, the Ninth Circuit has interpreted 28 U.S.C. §

23 1446(a) as requiring all defendants to either join in a notice of

24 removal or consent to removal thereafter. *Prize Frize, Inc.*, 167 F.3d

25 at 1266. It is undisputed that Wausau did not join in Hartford's

26 Notice of Removal. Consequently, Plaintiff argues this case must be

1 remanded for lack of unanimity between Defendants. However,
2 Defendants claim, despite Wausau's failure to join Hartford's Notice
3 of Removal, Wausau's conduct before and after the Notice of Removal's
4 filing constitutes consent to removal.

5 Defendants point to three specific instances they believe
6 constitute consent. First, Defendants allege, during several
7 telephonic conversations prior to Hartford's removal filing, counsel
8 for Wausau "verbally expressed" consent to removal to counsel for
9 Hartford. (Ct. Rec. 15 at 2; Ct. Rec. 16 at 5.) Second, Defendants
10 argue Wausau's decision to file an Answer with this Court, in which it
11 agrees jurisdiction is proper, is an expression of Wausau's consent to
12 removal. Third, Defendant's assert Wausau's filing of a jury demand
13 after Hartford's removal is further evidence of its consent to
14 removal.

15 Plaintiff responds by arguing consent must be expressed in
16 writing and that Wausau's pre-removal consent is ineffectual because
17 it was not expressed in Hartford's Notice of Removal. Plaintiff also
18 appears to contend that neither Wausau's Answer nor Demand for Jury
19 constitute "consent" to removal, because neither filing expressed
20 "unequivocal consent" to removal. (Ct. Rec. 18 at 4.)

21 None of the parties have offered any conclusive case law on the
22 subject of what constitutes "consent" to removal if a defendant has
23 not formally joined another party's notice of removal. However,
24 despite the lack of cited law on the subject, the Court agrees with
25 Defendants that the filing of a jury demand and answer that recognizes
26 jurisdiction is proper constitutes consent to an earlier filed notice

1 of removal. Thus, the Court finds that there was consent to removal
2 by both Defendants for two reasons: the defendants orally agreed to
3 remove the case to federal court, and Wausau's post-removal filings do
4 constitute consent.

5 **B. Timeliness**

6 Because Defendants have both expressed consent to removal, the
7 Court must now determine whether Wausau's post-removal consent was
8 timely. Removal is proper only if all defendants to an action have
9 expressed their consent to removal within "thirty days after receipt
10 by the defendant[s], through service or otherwise, of a copy of the
11 initial pleading setting forth the claim for relief upon which such
12 action or proceeding is based" 28 U.S.C. § 1446(b).

13 It is an open question in the Ninth Circuit whether the thirty-
14 day limit begins to run at the time service is perfected or whether the
15 time limit only begins after a defendant has actually received the
16 plaintiff's initial pleading. Plaintiff believes the thirty-day limit
17 begins to run the moment service is perfected, or in this case, once
18 the Insurance Commissioner received Plaintiff's complaint on Wausau's
19 behalf. However, Defendants contend the thirty-day limit did not
20 begin until Wausau's attorney received the complaint after it was
21 forwarded to him by the Insurance Commissioner. In considering when
22 the thirty-day time limit begins, the Court concurs with Judge Edward
23 C. Reed's determination in *Pilot Trading Company v. Hartford Insurance*
24 *Group*, 946 F.Supp. 834 (D. Nev. 1996), that the thirty-day limit does
25 not begin to run until a defendant actually receives a complaint after
26 it has been served on a government official on the defendant's behalf.

1 The "core function of service is to supply notice . . . that
2 affords the defendant a fair opportunity to answer the complaint and
3 present defenses and objections." *Henderson v. United States*, 517 U.S.
4 564 (1996). "Removal is one such defense or objection." *Pilot Trading*
5 *Co.*, 946 F.Supp. at 838. As such, defendants must be given notice of
6 actions pending against them before they are obligated to file a
7 notice of removal. Serving a government official, such as the
8 Insurance Commissioner, does not give defendants notice of actions
9 pending against them, it is only after the service materials are
10 forwarded to a defendant that it is apprised of its need to remove or
11 respond. It is conceivable that the Insurance Commissioner could
12 accept service on behalf of a defendant and negligently fail to
13 forward the service material to the defendant within thirty days. If
14 Plaintiff's position were adopted, the defendant would be wholly
15 precluded from removing the action to federal court for no fault of
16 its own. For this reason, the Court believes a better understanding
17 of the thirty-day rule is one that requires the defendant to have
18 notice of the suit pending against it before the thirty-day limit
19 begins to run.

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1 Thus, because nothing in the record indicates Wausau had notice
2 of Plaintiff's suit prior to April 19, 2005, the Court determines
3 Wausau had until May 19, 2005, to consent to removal. Because Wausau's
4 Demand for Jury and Answer were respectively file on May 6, 2005, and
5 May 9, 2005, the Court finds that Wausau's consent was timely made and
6 removal was proper. **ACCORDINGLY, IT IS HEREBY ORDERED:** Plaintiff's
7 Motion to Remand, **(Ct. Rec. 8)**, is **DENIED**.

8 **IT IS SO ORDERED.** The District Court Executive is directed to
9 enter this Order and provide copies to counsel.

10 **DATED** this 8th day of July 2005.

11
12 S/ Edward F. Shea
13 EDWARD F. SHEA
14 United States District Judge

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